IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-93,841-01

EX PARTE ROGER EARL HAWKINS JR., Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. C-371-W012068-0464520-A IN THE 371ST DISTRICT COURT
FROM TARRANT COUNTY

WALKER, J., filed a concurring opinion.

CONCURRING OPINION

I agree with the Court's decision to grant habeas corpus relief to Applicant Roger Earl Hawkins, Jr. because he is actually innocent of the offense in which he was convicted. But in addition to his innocence claim, Applicant claimed that the State failed to disclose exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The *Brady* claim has merit and should be discussed.

I — Facts

To understand what the State failed to disclose, and why that failure led to Applicant pleading guilty to a crime that he did not commit, it is necessary to look at what happened and what the State

should have told Applicant and his lawyer, but did not. The habeas court entered the following findings of fact[1] which are supported by the record:[2]

1. On November 15, 1991, thirteen-year-old B.M.[3] stayed home from school because she was feeling sick.

2. Sometime between 11:00 a.m. and 12:00 p.m., five males of varying races and ethnicities burst into her living room, and three of them sexually assaulted her.

3. This aggravated sexual assault was reported to the Fort Worth Police on November 27, 1991.

4. B.M. told Detective R.S. Dameron that these same five males had previously confronted her about reporting their involvement in a flooding incident at Crowley High School to the school's principal.

5. B.M. also told Detective Dameron that these same males harassed her at a basketball game.

6. B.M. did not personally know any of the perpetrators.

7. The police were unable to find any witnesses to this offense.

8. Detective Dameron obtained yearbooks from Crowley High School and from nearby Southwest High School, which he had B.M. review on December 3, 1991.

9. B.M. selected the Applicant's photograph from the yearbook as one of the perpetrators.

10. The Applicant was a nineteen-year-old sophomore at Crowley High School attending special education classes.

11. On December 9, 1991, Detective Dameron and another detective went to Crowley High School, where the Applicant was summoned to the principal's office.

12. The Applicant did not recognize B.M. by name but did recognize her photograph.

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[1] Clerk's R. 156–60 (internal citations omitted); Clerk's R. 194–95 (adopting proposed findings of fact but modifying Finding of Fact Number 24).

[2] *Ex parte Garcia*, 353 S.W.3d 785, 787–88 (Tex. Crim. App. 2011) ("In article 11.07 habeas cases, this Court is the ultimate finder of fact; the trial court's findings are not automatically binding upon us, although we usually accept them if they are supported by the record.").

[3] B.M. is a pseudonym. *See* TEX. R. APP. P. 9.10(a)(3).

13. The Applicant told the detectives that he had met B.M. once at a basketball game.

14. The detectives transported the Applicant to a police station where he gave a written statement that:
    - He met B.M. at [a] basketball game a few weeks earlier;
    - He spoke to B.M. with her mother standing nearby;
    - He asked B.M. for one of her cheerleading photographs, which she gave him, along with her phone number; and
    - He called her once but never saw her again.

15. The Applicant told the police that he was in school on November 15, 1991, when B.M. alleged that she was sexually assaulted.

16. The police told the Applicant that there were no records to prove that he was in school on November 15, 1991.

17. There is no evidence to suggest that the detectives or any other Fort Worth police officer attempted to check the Crowley High School attendance records to confirm or dispute the Applicant's alibi.

18. Crowley High School attendance records confirm that the Applicant was present in class on the morning of November 15, 1991, when B.M. alleged that she was sexually assaulted.

19. The Fort Worth Police never requested that the Applicant be subjected to a lineup for proper identification by B.M.

20. There is no evidence that the Fort Worth Police Department pursued any other suspects in the case after B.M. selected the Applicant's photograph from the yearbook.

21. On December 13, 1991, the Applicant returned to the police station to undergo a polygraph examination.

22. The Applicant met the police without an attorney.

23. The Applicant panicked after being told that he had failed the polygraph examination and told the police the following story:
    - He met B.M. at D.H.'s house several weeks before November 25, 1991;
    - The Applicant and B.M. began kissing;
    - The Applicant touched B.M.'s breasts and put his hands down her pants to engage in digital penetration; and
    - He left after B.M. declined his request for intercourse.

24. The Applicant's inculpatory December 13, 1991 statement is not credible due to the

Applicant's cognitive difficulties, the circumstances under which this statement was made and the content of the statement.

25. The Applicant was never provided the results of his polygraph examination.

26. There is no evidence that the Fort Worth Police Department ever provided the results of this polygraph examination to the prosecutors or the defense.

27. There is no evidence that the Fort Worth Police Department ever questioned B.M. regarding the Applicant's admission that he engaged in sexual contact with her by digital penetration.

28. On January 11, 1992, the Applicant returned to the police station after being arrested and recanted his statement that he had engaged in digital penetration with B.M.

29. Residents from D.H.'s[4] house denied that any sexual activity occurred there.

30. The Applicant was indicted on March 31, 1992, alleging in separate paragraphs that he committed aggravated sexual assault by penile penetration and by digital penetration.

31. The indictment's penile penetration paragraph was premised on B.M.'s allegation that, on November 15, 1991, five males of varying races and ethnicities burst into her living room and that three of them sexually assaulted her.

32. The indictment's digital penetration paragraph was premised on the Applicant's December 13, 1991, written statement that sometime in November 1991 he engaged in sexual contact with B.M., including digital penetration, at D.H.'s house.

Specifically regarding Applicant's *Brady* claim, the habeas court found:[5]

4. On May 4, 1992, the Applicant's plea counsel, Richard L. Wright, informed the prosecutors that the Applicant was at school on November 15, 1991, when B.M. was allegedly sexually assaulted.

5. On May 26, 1993, prosecutor Steve Wells requested his investigator obtain the Applicant's school attendance records for November 15, 1991 from Crowley High School.

6. This investigation request identified by name the Applicant's first three period teachers – Leona Rapp, Bill Strong and Jeanene Russell.

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[4] D.H. is also a pseudonym. *See* TEX. R. APP. P. 9.10(a)(3).

[5] Clerk's R. 165–69.

7. This investigation request states that the prosecutor had already spoken to Ms. Rapp and Mr. Strong.

8. On June 3, 1993, the State obtained the Applicant's attendance records for the period including November 15, 1991.

9. The Crowley High School attendance records showed that the Applicant was present in all his classes on the morning of November 15, 1991.

10. On June 4, 1993, Leona Rapp signed a statement that the Applicant attended her resource math class from 10:55 a.m. to 12:02 p.m. on November 15, 1991.

11. On June 9, 1993, Jeanene Russell signed a statement that the Applicant attended her occupation preparation class from 8:40 a.m. to 9:40 a.m. on November 15, 1991.

12. On June 10, 1993, William Strong signed a statement that the Applicant attended his English class from 9:46 a.m. to 10:46 a.m. on November 15, 1991.

13. Each statement was returned in an envelope provided by the State and directed to the attention of lead prosecutor Steve Wells.

14. The Crowley High School attendance records and the three teacher statements credibly validate the Applicant's alibi for the alleged November 15, 1991 sexual assault.

15. An undated note directs that the school records and teacher affidavits be placed in the disposed file for the Applicant's case.

16. On May 26, 1993, Mr. Wells interviewed B.M. and concluded that her story was not credible due to glaring inconsistencies.

17. Mr. Wells stated that he did not believe the case beyond a reasonable doubt and that it was not likely to result in a jury conviction.

18. Sometime between June 4 and June 9, 1993, the State offered the Applicant a plea bargain agreement of six years' deferred adjudication on the digital penetration allegation.

19. Mr. Wells made this plea bargain offer with approval of his trial court chief Richard Bland.

20. On June 9, 1993, the Applicant pled guilty to the digital penetration aggravated sexual assault allegation.

21. The digital penetration allegation is not supported by any evidence other than the Applicant's singular recanted admission after being told that he failed a polygraph examination regarding

that primary offense.

22. The State did not provide Mr. Wright with the Crowley High School attendance records before or after the Applicant entered his guilty plea.

23. The Applicant was not shown the Crowley High School attendance records confirming that he was in school on the morning of November 15, 1991, before he entered his guilty plea.

24. The State did not provide Mr. Wright with the statements by Ms. Rapp, Mr. Strong and Ms. Russell supporting the Applicant's alibi defense before or after he entered his guilty plea.

25. The Applicant was never shown the statements by Ms. Rapp, Mr. Strong and Ms. Russell supporting his alibi defense before he entered his guilty plea.

26. The State never informed Mr. Wright that they had interviewed B.M. and concluded that her story was not credible due to glaring inconsistencies.

27. The State never informed Mr. Wright that they did not feel comfortable trying this case before a jury due to B.M.'s credibility issues.

28. Had Mr. Wright been timely made aware of the Crowley High School attendance records, the teacher statements supporting the Applicant's alibi, and the other exculpatory evidence, he would have filed a motion for new trial based on that evidence.

29. The Applicant was confined in the Tarrant County Jail from August 17, 1992 until he pled guilty on June 9, 1993.

30. While an inmate in the Tarrant County Jail, the Applicant was beaten in the mouth with a milk crate and suffered serious injuries.

31. The Applicant wanted a trial because he did not commit the charged aggravated sexual assault, but his trial date kept getting postponed.

32. The Applicant pled guilty because he feared sitting in jail for another year and a half before proceeding to trial.

33. The Applicant feared that he would be assaulted again if he remained in the Tarrant County Jail.

34. The Applicant was facing a possible sentence of five to ninety-nine years or life confinement when the State made its plea offer of six years' deferred adjudication community supervision.

35. The Applicant entered his guilty plea under the duress of a never-ending pretrial

incarceration and the fear of being re-assaulted.

36. The Applicant entered his guilty plea under the duress of possibly serving a life sentence for a crime he did not commit.

37. Had the Applicant known that verifiable Crowley High School attendance records could prove his alibi to the alleged November 15, 1991 sexual assault, he would not have pled guilty to any offense against B.M. and would have proceeded to trial.

38. Had the Applicant known that his teachers had signed statements and informed the prosecutors that he was present in class on the morning of November 15, 1991, he would not have pled guilty to any offense against B.M. and would have proceeded to trial.

39. Had the Applicant known that D.H. provided a statement to the police that he had never been alone with B.M. in D.H.'s house, he would not have pled guilty to any offense against B.M. and would have proceeded to trial.

Specifically regarding Applicant's innocence claim, the habeas court found:[6]

34. B.M. met with members of the Tarrant County Criminal District Attorney's Office (TCCDAO) Conviction Integrity Unit (CIU) on March 13, 2018, and informed them that:
    - She never had sexual contact with the Applicant, including at D.H.'s house;
    - The sexual contact described by the Applicant in his written custodial statement never occurred; and
    - The Applicant pled guilty to something that did not happen.

35. B.M.'s March 13, 2018, interview with the TCCDAO CIU was freely and voluntarily given.

36. Ever since being informed about the digital penetration allegation, B.M. has repeatedly and consistently stated that this allegation is false and never occurred.

37. In three separate telephone conversations with members of the TCCDAO CIU team, B.M. expressed doubt that the Applicant was a perpetrator in the November 15, 1991 multi-party sexual assault.

38. Investigator John Oswalt met with B.M. twice on November 6, 2020 – once accompanied by Applicant's counsel and once accompanied by Applicant's counsel and an attorney from the TCCDAO CIU team.

39. B.M. clearly stated that she had no recollection of any sexual contact with the Applicant at D.H.'s house and that he was not one of the males involved in her 1991 sexual assault.

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[6] Clerk's R. 160–62.

40. On November 10, 2020, B.M. signed a sworn affidavit stating that the digital penetration never occurred and that she has no recollection of ever being alone with the Applicant, including at D.H.'s home where this digital penetration allegedly occurred.

41. B.M. was calm and lucid when she read and signed the affidavit and understood its contents.

42. B.M. was not pressured or coerced into signing her affidavit.

43. B.M.'s November 2020 affidavit exonerating the Applicant from sexually assaulting her by digital penetration at D.H.'s house was freely and voluntarily given.

44. B.M.'s 2018 oral statement and 2020 written statement that the charged digital penetration sexual assault never occurred is newly discovered evidence unavailable to the Applicant when he entered his guilty plea.

45. B.M.'s 2018 oral statement and 2020 written statement that the charged digital penetration sexual assault never occurred are credible and support the Applicant's innocence.

46. The Applicant's December 13, 1991 statement is the only evidentiary basis for his digital penetration sexual assault conviction.

47. There is no credible evidence that the Applicant sexually assaulted B.M. by digital penetration – the charge for which he was convicted.

48. There is no credible evidence that this alleged digital penetration sexual assault ever occurred.

49. The Crowley High School attendance records are credible evidence that the Applicant was present in class on the morning of November 15, 1991, when B.M. was allegedly sexually assaulted by three of five perpetrators.

50. On June 9, 1993, Jeanene Russell signed a statement that the Applicant attended her occupation preparation class from 8:40 a.m. to 9:40 a.m. on November 15, 1991.

51. On June 10, 1993, William Strong signed a statement that the Applicant attended his English class from 9:46 a.m. to 10:46 a.m. on November 15, 1991.

52. On June 4, 1993, Leona Rapp signed a statement that the Applicant attended her resource math class from 10:55 a.m. to 12:02 p.m. on November 15, 1991.

53. Mr. Oswalt spoke with Ms. Russell and Mr. Strong, who each confirmed and authenticated their signatures on these 1993 statements.

54. The 1993 statements by Ms. Russell, Mr. Strong and Ms. Rapp are credible evidence that the Applicant was in class all morning on November 15, 1991, when B.M. alleged that she was sexually assaulted.

55. There is no credible evidence that the Applicant participated in the alleged November 15, 1991 multi-perpetrator sexual assault.

56. There is no credible evidence that the Applicant sexually assaulted B.M. by penile penetration on November 15, 1991.

With those findings of fact, the habeas court concluded that Applicant established his actual innocence by clear and convincing evidence[7] and that his due process rights were violated when the State withheld material, favorable evidence in its possession.[8] The habeas court also entered findings and conclusions on Applicant's claims that his trial counsel and revocation counsel both rendered ineffective assistance of counsel.[9]

II — *Brady*

In *Brady v. Maryland*, the United States Supreme Court "[held] that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. *Brady* is violated when three requirements are satisfied: (1) the State suppressed evidence; (2) the suppressed evidence is favorable to the defendant; and (3) the suppressed evidence is material. *Harm v. State*, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006). "Incorporated into the third prong, materiality, is a requirement that [the] defendant must be prejudiced by the state's failure to disclose the favorable evidence." *Id.*

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[7] Clerk's R. 164.

[8] *See* Clerk's R. 174.

[9] Clerk's R. 175–88. I will express no opinion on the trial court's findings in this regard.

"Favorable evidence is any evidence that, if disclosed and used effectively, may make a difference between conviction and acquittal and includes both exculpatory and impeachment evidence." *Id.* at 408 (citing *Thomas v. State*, 841 S.W.2d 399, 404 (Tex. Crim. App. 1992) and *United States v. Bagley*, 473 U.S. 667, 676 (1985)). "Exculpatory evidence may justify, excuse, or clear the defendant from fault, while impeachment evidence is that which disputes or contradicts other evidence." *Id.* "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682; *see also Ex parte Adams*, 768 S.W.2d 281, 291 (Tex. Crim. App. 1989) (adopting *Bagley* standard of materiality). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). "Materiality is determined by examining the alleged error in the context of the entire record and overall strength of the state's case." *Harm*, 183 S.W.3d at 409. "The suppressed evidence is considered collectively, not item-by-item." *Diamond v. State*, 613 S.W.3d 536, 546 (Tex. Crim. App. 2020).

II(A) — State Failed to Disclose

In this case, each of the three *Brady* requirements are satisfied. *See Harm*, 183 S.W.3d at 406. First, the State's evidence was not disclosed to the defense. *See id.* At the writ hearing, Applicant's trial counsel testified that the first time he had ever seen the school attendance records was at the writ hearing. He had also never seen the statements from Applicant's teachers before the hearing—much less before the guilty plea was entered. Counsel did not remember whether the prosecutors ever provided D.H.'s statement. The following excerpt from the writ hearing shows counsel's knowledge

of the prosecution's interview with B.M.:[10]

> Q. Okay. So you have no independent recollection of being told of an interview, again, prior to Mr. Hawkins pleading guilty in which the DA's office interviewed the Complainant and found her to be not credible and said that she told numerous inconsistencies and that there is no way he would try this case?
>
> A. God no.
>
> Q. Do you think that's something you would remember if you were told?
>
> A. Yes. There are certain facts about this case I do recall and if I had been told that I damn sure -- pardon my French -- would have recalled that, yes.

II(B) — Favorable

Second, the evidence that the State failed to disclose to Applicant was favorable to his case. *See Harm*, 183 S.W.3d at 406. The school records and teachers' statements confirm that Applicant was in class at the exact time the alleged multi-party sexual assault occurred. The State also knew that B.M. had provided inconsistent statements to prosecutors that raised questions regarding her credibility and whether the case was believable beyond a reasonable doubt. Further, D.H. gave a statement to the police that Applicant and B.M. had never been alone together in D.H.'s home, undermining Applicant's (recanted) statement that he digitally penetrated B.M. All of this evidence was kept from Applicant and was favorable to his case.

II(C) — Material

Finally, the evidence was material. *See id.* The only evidence supporting Applicant's guilty plea was the subsequently recanted statement that Applicant made when he panicked after the police told him he failed the polygraph examination. It should be noted that there is no evidence that he

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[10] Writ Hr'g R. 56.

actually failed the polygraph examination. The only evidence about the polygraph is that the police officer told Applicant that he failed the polygraph examination.[11]

Polygraph aside, had the State timely disclosed the school evidence supporting Applicant's alibi for the multi-party sexual assault, its credibility concerns regarding B.M., and D.H.'s statement that Applicant and B.M. had never been alone together in D.H.'s home, there is far more than a reasonable probability that the result would have been different. *See Bagley*, 473 U.S. at 682. Applicant had a solid alibi for the multi-party sexual assault and would have sought dismissal of that count; if not dismissed, Applicant would have proceeded to trial. As for the digital penetration assault, there was no proof that the offense ever occurred aside from Applicant's recanted statement, and there was evidence—D.H.'s statement—indicating that it did not happen.[12] Counsel would not have advised Applicant to plead guilty, and Applicant would not have pled guilty. And, if trial counsel had been made aware of the undisclosed evidence after Applicant pled guilty, it is more than reasonably probable that he would have filed a motion for new trial which (hopefully) would have been granted.[13]

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[11] It is possible that Applicant actually passed the polygraph examination, and that the officer told Applicant he failed in order to solicit a confession. "Some types of police deception employed during custodial interrogation, designed to elicit a confession from the accused, are constitutionally permissible." *Green v. State*, 934 S.W.2d 92, 99 (Tex. Crim. App. 1996) (citing *Frazier v. Cupp*, 394 U.S. 731, 739 (1969)).

[12] Had Applicant gone to trial on the digital penetration assault, B.M. likely would have testified that the assault never happened, as reflected by the newly developed evidence supporting Applicant's innocence claim.

[13] Counsel answered at the writ hearing:

> Q: . . . if you had been made aware of those school records or any of the other exculpatory evidence we have gone through, the interview with the complaining witness or [D.H.]'s statement, then would you have filed a motion for new trial based on newly disclosed evidence or possible Brady

III — Conclusion

The State withheld favorable, material evidence that it had in its possession—violating Applicant's due process rights. Accordingly, he is entitled to habeas corpus relief for the State's *Brady* violation in addition to his actual innocence.

As a result of the State's error, Applicant—an innocent man—pled guilty to an offense that did not happen. This would not have occurred absent the State's misconduct. Prosecutors must take heed to ensure that defendants get such important, exculpatory evidence. The protections of *Brady* and the Michael Morton Act[14] serve more than just defendants. These protections allow prosecutors to fulfill their primary duty—seeing that justice is done.[15] There is no justice in an innocent person being convicted of a crime that did not happen, and there is no justice when the perpetrators of a crime that did happen go free because the wrong man was blamed.

I concur with the Court's decision to grant habeas corpus relief.

Filed: August 24, 2022
Publish

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violation?

A. Would have looked at all options at that point and taken appropriate steps. So as much as I can say yes on the assumption, yes, I would have.

Writ Hr'g R. 57.

[14] *See* Michael Morton Act, 83rd Leg., R.S., ch. 49, 2013 Tex. Gen. Laws 106 (current version at TEX. CODE CRIM. PROC. Ann. art. 39.14).

[15] TEX. CODE CRIM. PROC. Ann. Art. 2.01 ("It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done.").